STATEMENT OF THE CASE

I. These Actions Involve Efforts By Foreign Governments To Enforce Their Revenue Laws in U.S. Courts

In these consolidated lawsuits, several Departments of the Republic of Colombia ("Colombian Departments"), the European Community ("EC"), and ten of the EC's member states ("Member States") sought to recover unpaid foreign taxes and obtain related relief arising from alleged cigarette smuggling schemes. Petitioners alleged, among other things, that the respondent companies "facilitated the smuggling of cigarettes illegally" into their countries. CA App. A-311;[2] *accord* CA App. 1944; App. 4a, 21a-22a.

In their complaints, petitioners sought principally to recover taxes lost by reason of the alleged schemes. CA App. A-312-13, A-1934; App. 8a. Specifically, petitioners sought to recover as monetary damages:

- "[E]xcise taxes that would have been paid on the cigarettes in question absent the wrongful activities of the Defendants";
- "Customs duties";
- "Value-added tax levied on cigarettes"; and
- Derivative costs such as law enforcement and other governmental expenses incurred "to fight against cigarette smuggling."

CA App. A-409-11; *accord* CA App. A-2021-26; App. 5a, 23a. Petitioners' complaints also sought injunctive and

2. "CA App." refers to the Joint Appendix filed with the United States Court of Appeals for the Second Circuit.

equitable relief, including orders to "disgorge" proceeds from the smuggling scheme and court-ordered protocols that would help petitioners "track and monitor the movement of cigarettes into and within" their foreign territories to assist in their enforcement of foreign revenue and customs laws. CA App. A-419-20, A-2025-26; *accord* App. 5a, 23a.

Petitioners sued under the civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), and brought state common law claims based on diversity jurisdiction.[3] App. 3a, 19a.

Despite the focus of their complaints, petitioners now, as in their previous petition for certiorari, abandon their federal RICO claims and their claims for damages, apparently in an attempt to make these cases appear less like *Canada* and *Honduras*, where certiorari was denied. Instead, they assert that the "main focus" of these actions is state tort law, specifically, state common law claims seeking injunctive and equitable relief. *See* Pet. 2-3 nn.3-4.

II. Other Circuit Court Decisions Concerning Identical Civil Actions By Other Foreign Governments

While these consolidated actions were pending in the district court, the Second Circuit decided *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002). There, Canada filed a civil RICO and state common law action in New York federal court alleging that several tobacco

3. Diversity jurisdiction, however, is lacking in the Colombian Departments' action because there is no complete diversity—there are foreign parties on both sides of the case. *See Grupo Dataflux v. Atlas Global Group*, 541 U.S. 567, 569 (2004) (diversity is absent where "aliens [are] on both sides of the case") (citing *Mossman v. Higginson*, 4 Dall. 12, 14 (1800)).

companies had engaged in a scheme to smuggle cigarettes into Canada. *Id.* at 105-06. Like petitioners here, Canada sought to recover unpaid taxes, treble damages related to these taxes, and injunctive relief designed to enforce its tax laws. *Id.*

The Second Circuit held that the Revenue Rule—a "common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns"—barred all of Canada's claims. *Id.* at 109. The court explained that the Rule had "continuing vitality" in modern times because it serves important separation-of-powers interests. *Id.* For instance, it avoids judicial scrutiny of another nation's tax policies, which prevents "embroil[ing] United States courts in delicate issues in which they have little expertise or capacity." *Id.* at 113. The Rule also ensures that the judiciary will not interfere with foreign tax matters and be "drawn into issues and disputes of foreign relations policy that are assigned to—and better handled by—the political branches of government." *Id.* at 114. The court recognized, for instance, that allowing civil tax-based actions would undercut the Executive Branch's ability to negotiate treaties, since nations would know they could obtain tax enforcement without providing the U.S. reciprocal rights simply by filing a lawsuit in U.S. courts. *Id.* at 119, 122.

Finally, the Second Circuit explained why the Revenue Rule barred Canada's civil action, despite its prior ruling in *Trapilo* that the Rule was no bar to *criminal* wire fraud prosecutions based on a scheme to smuggle liquor from the U.S. into Canada: "When the United States prosecutes a criminal action . . . the foreign relations interests of the United States may be accommodated throughout the litigation." *Id.* at 123.

Canada subsequently filed a petition for a writ of certiorari, and the Court invited the Solicitor General to express the views of the United States. On behalf of the United States, the Acting Solicitor General—in a joint submission with the Departments of State and Treasury—opposed the granting of certiorari and supported the Second Circuit's application of the Revenue Rule based on "important separation-of-powers interests." Brief for the United States As Amicus Curiae at 6, *Canada*, 537 U.S. 1000 (No. 01-1317). This Court denied certiorari. *Canada*, 537 U.S. 1000.

After *Canada* was filed, but before the Second Circuit issued its decision, various Central and South American countries brought a series of actions modeled after *Canada* in Florida federal court, seeking to recover lost foreign taxes and various forms of injunctive relief from purported smuggling schemes. Like the Second Circuit, the Eleventh Circuit affirmed the dismissal of these suits based on the Revenue Rule. *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003). The plaintiff-governments there also filed a petition for a writ of certiorari, which this Court denied. *Honduras*, 540 U.S. 1109.

III. The Initial Proceedings Below

A. The District Court's Decision

After the Second Circuit issued its decision in *Canada*, the district court dismissed petitioners' complaints based on the Revenue Rule. App. 47a. The court considered both petitioners' demands for lost tax revenue as well as the claims for injunctive and equitable relief. App. 57a-58a. Noting that petitioners' requested injunctive relief was "designed to impede smuggling, improve future defenses against smuggling, and recoup monies lost to smuggling," the court

determined that this relief also triggered the Revenue Rule. App. 58a.

Although the district court dismissed with prejudice petitioners' RICO and common law claims predicated on smuggling, App. 68a-69a, the court dismissed their "money laundering" claims without prejudice on other grounds, allowing petitioners to bring new money laundering allegations to the extent that the claims had no nexus to foreign tax enforcement. App. 76a.[4]

B. The Second Circuit's Initial Decision

In its initial opinion, the Second Circuit affirmed the dismissal of the present cases. App. 45a. The court found that petitioners' allegations were "markedly similar to those at issue in *Canada*." App. 30a. Like the Canadian government, the court noted, petitioners premised their complaints on various tax-related injuries. App. 30a-31a. Accordingly, the court found its decision controlled by *Canada*. App. 31a.

The Second Circuit rejected petitioners' argument that the foreign policy concerns underlying the Revenue Rule were not implicated in these cases. App. 31a. First, the court reiterated that enforcement of foreign tax laws is a question of "'foreign relations policy . . . assigned to—and better handled by—the political branches of government.'" App. 28a (quoting *Canada*, 268 F.3d at 123). Thus, "the modern revenue rule is rooted in both our perception

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4. The court dismissed the "money laundering" claims because they lacked a "causal connection to the harm alleged, once the money laundering allegations are removed from the context of the smuggling scheme. . . ." App. 73a. The claims were dismissed without prejudice, allowing petitioners to refile. App. 76a, 78a-79a. Petitioners subsequently have refiled those claims against certain defendants.

that the branches of government responsible for conducting foreign affairs wish to uphold the rule, and our reluctance to intrude upon the greater expertise of the political branches. . . ." App. 29a. Like the Eleventh Circuit, the court found that over 50 tax treaties between the United States and other nations "reflected the political branches' continuing recognition of the revenue rule." App. 29a.

Second, the court rejected the argument that petitioners' claims for injunctive relief fell beyond the scope of the Revenue Rule. App. 42a. The court found that, where a foreign sovereign seeks to enforce foreign tax laws, the same separation-of-powers problems arise irrespective of whether the remedy sought is compensation or an injunction. App. 42a.

Finally, as in *Canada*, the court reiterated the fundamental distinction between civil and criminal cases when it comes to the Revenue Rule:

> [W]here the executive branch has "expressed its consent to adjudication by the courts," the institutional and separation of powers concerns behind the rule are mitigated, because the branch with primary responsibility for conducting foreign relations has indicated that extraterritorial enforcement of the foreign tax laws at issue is in the interests of the United States.

App. 29a (quoting *Canada*, 268 F.3d at 123 n.25).

IV. *Pasquantino*, the Remand, and the Second Circuit's Decision on Remand

In May 2005, the Court granted, vacated, and remanded these cases to the Second Circuit "for further consideration in light of *Pasquantino v. United States*," App. 15a, a decision that held that the Revenue Rule did not bar the United States from bringing a criminal wire fraud prosecution based on a scheme to smuggle liquor from the U.S. into Canada.

A. *Pasquantino v. United States*

In *Pasquantino*, the Court addressed two principal questions: (1) whether the smuggling scheme at issue fell within the "literal terms of the wire fraud statute"; and (2) if so, whether the Revenue Rule still barred such a prosecution. *Pasquantino*, 125 S. Ct. at 1771, 1773.

After finding that the smuggling scheme fell within the language of 18 U.S.C. § 1343, the Court addressed whether the Revenue Rule nevertheless barred the prosecution. The Court first looked at whether, when the wire fraud statute was enacted, the Revenue Rule precluded the government from prosecuting a defendant under its own domestic laws for an attempted smuggling scheme. 125 S. Ct. at 1774. The Court found no precedent applying the Revenue Rule to preclude a sovereign from enforcing its penal laws. *Id.*

Turning then to the purposes of the Revenue Rule, the Court recognized that the Rule serves separation-of-powers interests, but held that the special characteristics of criminal prosecutions brought by the Executive Branch rendered the Revenue Rule inapplicable. *Id.* at 1779. For example, the Court recognized that the Revenue Rule was designed to prevent the judiciary from becoming embroiled in a foreign nation's social policies, but found that this purpose had little

application to the prosecution before the Court: "[T]his prosecution poses little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other sovereigns." *Id.* Federal criminal prosecutions do not pose such a risk, the Court reasoned, because of the active participation of the Executive Branch in enforcing its domestic criminal laws. *Id.* at 1777 ("The present prosecution creates little risk of causing international friction. . . . This action was brought by the Executive to enforce a statute passed by Congress").

While finding the Revenue Rule inapplicable to the criminal prosecution in *Pasquantino*, the Court "express[ed] no view" on "whether a foreign government . . . may bring a civil action under the Racketeer Influenced and Corrupt Organizations Act for a scheme to defraud it of taxes. See *Attorney General of Canada v. R.J. Reynolds* []; *Republic of Honduras v. Philip Morris Cos.*" *Id.* at 1771 n.1.

B. The Second Circuit's Decision on Remand

In September 2005, the Second Circuit issued its remand decision affirming the dismissal of petitioners' complaints under the Revenue Rule. App. 3a. The court held that "*Pasquantino* casts no doubt on the reasoning or the result" of its initial decision. App. 14a.

As a threshold matter, the court noted that *Pasquantino* expressly declined to state a view on the Revenue Rule's application to civil cases like those here. App. 6a. The court then addressed whether the reasoning of *Pasquantino* in any way altered its decision. The court concluded that it did not.

The court reiterated its view that the Revenue Rule is "designed to address two concerns: first, that policy

complications and embarrassment may follow when one nation's courts analyze the validity of another nation's tax laws; and second, that the executive branch, not the judicial branch, should decide when our nation will aid others in enforcing their tax laws." App. 8a. The Second Circuit explained why these policy concerns are not implicated in criminal prosecutions: "when the executive branch affirmatively consents to litigation (e.g., by initiating it in a criminal prosecution), there is little reason to worry about infringing on the executive's sphere of decision-making, and the rule will not be applied." App. 9a.

The court then concluded that *Pasquantino* recognized the same principles. Specifically, the Second Circuit found that "the involvement of the United States government was a key factor in determining the outcome of *Pasquantino*." App. 11a. The absence of the United States in the present cases, therefore, was critical: "The present civil lawsuit, on the other hand, is brought by foreign governments, not by the United States." App. 11a. Indeed, "in *Pasquantino*, as well as in *Canada*, the United States government argued that the revenue rule does not apply to criminal prosecutions, but agreed that the rule applies to civil cases brought by foreign governments involving any direct or indirect attempt to enforce their tax laws." App. 11a n.8.

Finally, the court addressed and rejected petitioners' arguments, identical to those here, that (a) the Revenue Rule applies only to suits where the "whole object" is the collection of taxes; (b) the Rule does not apply to domestic law claims for injunctive and equitable relief; and (c) the discussion of tax treaties in *Pasquantino* conflicts with the *Canada* decision. App. 12a-14a.

In sum, the Second Circuit, after a thorough analysis that considered all of petitioners' arguments, held that "*Pasquantino* casts no doubt on the reasoning or the result of" its initial decision. App. 14a.

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT CORRECTLY HELD THAT *PASQUANTINO* IS FULLY CONSISTENT WITH THE DECISIONS BELOW.

Rather than grant petitioners' request for "summary reversal,"[5] this Court should deny review because the Second Circuit correctly determined that *Pasquantino* is entirely consistent with the lower courts' grounds for dismissal of these civil cases under the Revenue Rule. Moreover, that determination does not conflict with any federal or state court ruling. Denial of review also is consistent with the views of the United States, which support the dismissal below.

A. *Pasquantino* Validated, Not Superseded, the Second Circuit's Approach to the Revenue Rule.

The Court's analytical framework, reasoning, and holding in *Pasquantino* fully support the dismissal of these cases under the Revenue Rule.

First, *Pasquantino* confirmed the analytical framework used by the Second Circuit. Specifically, in *Pasquantino*, the Court began its analysis of the Revenue Rule with an inquiry

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5. Given that the Court in *Pasquantino* "express[ed] no view" on cases like these, the request for summary reversal is absurd. *Pasquantino*, 125 S. Ct. at 1771 n.1. Summary reversal is an extraordinary remedy appropriate only when "the lower court result is . . . clearly erroneous" and contrary to "a controlling Supreme Court precedent." Robert L. Stern et al., Supreme Court Practice 316 (8th ed. 2002); *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999) ("[S]ummary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law."). That petitioners disagree with the Second Circuit's remand opinion is hardly grounds for such extraordinary relief.

into whether, at the time the criminal wire fraud statute was enacted, the Revenue Rule was a well-established bar to the federal government prosecuting a defendant under its domestic laws for an attempted smuggling scheme. *Pasquantino*, 125 S. Ct. at 1774 & n.5 (following *Texas* and *Astoria* cases). The Court found no precedent applying the Revenue Rule to preclude a domestic criminal prosecution. *Id.* at 1774. In the decisions below and in *Canada*, the Second Circuit applied the same framework, concluding that the Revenue Rule always applied in *civil* actions brought by *foreign governments*, including when RICO was enacted. *Canada*, 268 F.3d at 126-29 (following *Texas* and *Astoria* cases); *accord* App. 30a, 7a-8a.

Second, *Pasquantino* identified the same purposes underlying the Revenue Rule relied upon by the Second Circuit. For example, the Court recognized that the Revenue Rule was designed to prevent the judiciary from becoming embroiled in a foreign nation's social policies and served separation-of-powers purposes. *Compare Pasquantino*, 125 S. Ct. at 1779-80 *with* App. 8a-9a (decision below on remand); App. 28a-30a (original decision).

Third, *Pasquantino* recognized that the sovereignty and separation-of-powers purposes underlying the Rule are not implicated in criminal prosecutions because of the control of the Executive Branch in enforcing its domestic criminal laws:

> [W]e may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction. We know of no common-law court that has applied the revenue rule to bar an action accompanied by such

> a safeguard, and neither petitioners nor the dissent directs us to any.

Pasquantino, 125 S. Ct. at 1779.

This, as the remand decision below recognized, "actually affirm[ed] the prior law of [the Second] Circuit, under which the revenue rule was held inapplicable to § 1343 smuggling prosecutions" in *United States v. Trapilo*. *See* App. 12a; *accord Pasquantino*, 125 S. Ct. at 1771 (noting that Court was resolving conflict between *Trapilo* and other cases). Indeed, in *Canada*, the Second Circuit expressly explained the fundamental difference between criminal and civil cases in this context:

> [W]ith regard to the revenue rule, there is a critical difference between this civil suit brought by a foreign sovereign and the criminal actions previously considered by panels of this court. In *Trapilo* . . . the executive branch of the United States brought the case, while here, Canada is the plaintiff. When the United States prosecutes a criminal action . . . the foreign relations interests of the United States may be accommodated throughout the litigation. In contrast, a civil RICO case brought to recover tax revenues by a foreign sovereign to further its own interests, may be, but is not necessarily, consistent with the policies and interests of the United States.

Canada, 268 F.3d at 123-24 (footnotes omitted); *see also* App. 29a. This distinction also was central in the remand decision: "In *Pasquantino*, [the separation-of-powers] concern was alleviated by the direct participation of the political branches in the litigation. Here we have no such assurance. We therefore see no reason why *Pasquantino*'s analysis should disturb our conclusion that the revenue rule bars" the present cases. App. 14a (citations omitted).

Thus, though *Pasquantino* expressly stated "no view" on civil cases like these, the decision was fully consistent with the rulings below and certainly presents no ground for review. Indeed, even Judge Calabresi, who dissented in *Canada*, recognized that "*Pasquantino* does not cast doubt on the holding in *EC I*." App. 7a n.6.

B. There Is Complete Unanimity Among this Court's Decision in *Pasquantino*, the Views of the United States, and the Decisions of the Second Circuit and Other Federal Courts.

The decision below does not conflict with any decision of this Court, any Court of Appeals, or for that matter, any court anywhere in the world. Both the Second Circuit and Eleventh Circuit have now squarely considered the Revenue Rule's application to civil suits to vindicate foreign revenue laws, and both have reached the same conclusion: as a matter of foreign relations and separation-of-powers, civil actions by foreign governments seeking to enforce their revenue laws in U.S. courts are barred by the Revenue Rule. That includes not only actions seeking to collect foreign taxes, but also those seeking common law claims for injunctive relief designed to enforce foreign tax laws. App. 14a, 42a; *Honduras*, 341 F.3d at 1257-59; *Canada*, 268 F.3d at 118-19. Within the last three years, the Court twice has refused to grant certiorari in these cases to review this long-settled principle. The Court should reach the same result here.

Petitioners erroneously claim that the holding below "conflicts" with the holdings of the Fourth and Ninth Circuits that application of the Revenue Rule is limited to tax judgments. Pet. 20. No such conflict exists. The Fourth Circuit's *Pasquantino* decision addressed a criminal prosecution, not a civil judgment. And nothing in *Her Majesty the Queen in Right of the Province of British Columbia v.*

Gilbertson, 597 F.2d 1161 (9th Cir. 1979), suggests that the Rule was limited to tax judgments. This Court's decision in *Pasquantino* itself recognized that courts addressing the Revenue Rule in civil cases have considered not the form of the action, but the "'substance of the claim.'" *Pasquantino*, 125 S. Ct. at 1776 (quotation source omitted).[6]

Further, the Second Circuit's holding not only is consistent with the holdings of every other federal court, but is also fully in accord with the views of the United States. As noted, in *Canada*, the Acting Solicitor General—at the invitation of the Court in the context of the Canadian government's petition for *certiorari*—expressed the views of the United States that the Second Circuit "correctly held that the revenue rule precludes a foreign government from bringing a civil RICO claim where its alleged injury is lost tax revenue." Brief for the United States As Amicus Curiae at 6, *Canada*, 537 U.S. 1000 (No. 01-1317). The United States recognized that the Revenue Rule serves important separation-of-powers interests in the civil context.

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6. Petitioners also erroneously claim that the decision below "conflicts" with the laws of Ireland and Canada because, they say, those countries apply the Revenue Rule only when the "whole object" of the claims are to enforce foreign revenue laws. Pet. 20. As a threshold matter, a conflict with foreign law is no grounds for review. S. Ct. R. 10(a). Furthermore, even if Ireland and Canada applied the Rule more restrictively, that would not be grounds for U.S. courts to follow suit, particularly when doing so would be contrary to the views of the political branches. In any event, the cases cited by petitioners expressly recognize that the Revenue Rule applies to direct and *indirect* enforcement of foreign revenue laws. *See Canada*, 268 F.3d at 130-32 (discussing *Peter Buchanan* and *Harden* foreign cases cited in Pet. 20). Finally, even under petitioners' view of those cases, there would be no conflict with the decision below since the Second Circuit found that "the '*whole object*' of the present suit is to collect tax revenue and costs associated with its collection." App. 13a (emphasis added).

Id. at 6-7. At the same time, the United States recognized that these interests are not implicated in criminal prosecutions, where the Revenue Rule should not apply:

> The distinction between a criminal prosecution brought by the United States and a civil action for the recovery of tax revenue brought by a foreign sovereign is critical, and it precisely aligns with the policies underlying the revenue rule. As the court of appeals explained, criminal prosecutions vindicate the interests of the United States, and they are subject to Executive Branch control. In contrast, a foreign sovereign brings a civil RICO action to further its own interest in collecting taxes, and that interest is not in all circumstances necessarily consistent with the interests of the United States.

Id. at 16 (citations omitted). In *Pasquantino*, the Acting Solicitor General, again expressing the views of the United States, confirmed the United States' position in *Canada* that the Revenue Rule does not apply to criminal prosecutions, but does apply to civil suits brought by foreign governments to vindicate foreign tax laws. Brief for the United States at 15 n.4, *Pasquantino*, 125 S. Ct. 1766 (No. 03-725).

The present cases aptly illustrate the concerns underlying the United States' views. For instance, the United States negotiated an agreement with the national Colombian government, which provides for limited information sharing on tax issues. *See* Agreement for the Exchange of Tax Information, U.S.-Colom., Mar. 30, 2001, 2001 WTD 88-16. Petitioners cannot explain why the Colombian Departments—political subdivisions of the Republic of Colombia that do not have any tax treaty with the United States—should have *greater* rights to tax enforcement

assistance than those the United States agreed to give the national Colombian government. Nor, for that matter, can petitioners explain why the Colombian Departments should be entitled to greater rights in American courts than the United States would receive in Colombian courts.[7]

Similarly, the *EC* case, if allowed to proceed, would provide the Member States with tax assistance *denied* to them by treaty. The United States has separate treaties with each of the Member States in this suit "providing for limited extraterritorial tax enforcement assistance but stopping well short of the assistance requested here." *Canada*, 268 F.3d at 113; *accord id.* at 115-19. These tax treaties with the Member States are not uniform, but reflect U.S. foreign policy and reciprocity considerations unique to each country. Not one of those treaties authorizes enforcement of the claims in this case.

Petitioners nowhere address the United States' concerns that allowing the present suits could undercut its ability to negotiate future treaties. In the end, petitioners' proper recourse is to the political branches or their own courts.

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7. Indeed, the sovereigns here follow the Revenue Rule. *See, e.g., QRS 1 ApS v. Frandsen*, [1999] 3 All E.R. 289 (C.A. 1999) (Revenue Rule "'is deeply embedded not only in the common law, but also in the law of civil law countries'") (citation omitted); *accord Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, [1986] A.C. 368, 428 (H.L.) ("[A]t present the international rule with regard to the non-enforcement of revenue and penal laws is absolute."). The Member States in fact have executed a multilateral treaty, in which they retain the Revenue Rule in their own jurisdictions. *See* European Communities: Convention On Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters art. 1, July 28, 1990, 29 I.L.M. 1413, 1418.

C. Petitioners' Arguments That *Pasquantino* Mandates Reversal Are Meritless

1. *Pasquantino* Did Not "Supplant" the Revenue Rule's Longstanding Bar to Foreign Tax Enforcement Claims Brought Under U.S. Domestic Law

Pasquantino recognized that the purpose of the federal government's criminal prosecutions is not enforcing a foreign nation's interests, but protecting domestic interests. *Pasquantino*, 125 S. Ct. at 1776. But such is *not* the case where, as here, a foreign government brings a civil suit. The clear purpose of such a suit is the vindication of the foreign government's tax laws. Petitioners thus err in attempting to stretch *Pasquantino* beyond the criminal context to "supplant" the bar on efforts by foreign governments to enforce foreign revenue laws in U.S. courts using U.S. domestic law. Pet. 18-19, 21-22.

The complaints in these actions illustrate this distinction. Petitioners sought to recover as damages unpaid taxes and derivative costs such as foreign law enforcement and other governmental expenses incurred "to fight against cigarette smuggling." CA App. A-409-14; *accord* CA App. A-2021-26, App. 5a, 23a. The claims for equitable relief sought, among other things, to require respondents to create "protocols" that would help petitioners combat smuggling and "track and monitor the movement of cigarettes into and within" their foreign territories. CA App. A-419-20, A-2025-26. By any measure, the purpose of these suits is to vindicate and enforce foreign tax laws and the various foreign social policies embodied therein.

Nor does the fact that plaintiffs no longer wish to "focus," Pet. 2-3 nn.3-4, on their federal RICO claims and now assert

only state law claims allow them to circumvent the Revenue Rule. *See* Pet. 2-6, 22-23. In fact, if anything, *Pasquantino* suggests that there is a *heightened* need to apply the Revenue Rule to state common law claims. The Court held that federal prosecutions "embod[y] the policy choice of" the Executive and Legislative branches of government. 125 S. Ct. at 1780. Here, by contrast, *neither* the Executive nor Legislative branch has allowed these plaintiffs to assert *state* claims to vindicate foreign tax laws. Allowing such claims would not only undermine the Rule; it also would trigger federalism concerns because it would inject fifty separate state law regimes into matters of foreign relations, compounding exponentially the very problems that the Rule is designed to prevent. Thus, the Second Circuit's application of the Revenue Rule to common law claims is in no way contrary to *Pasquantino*.

Finally, simply because petitioners "disavowed" that their domestic law claims involve foreign tax enforcement does not make it so, and the Second Circuit did not "misapprehend the claims as pled." Pet. 22. Petitioners cannot evade the Revenue Rule by recharacterizing their claims. As the United States itself recognized in *Canada*:

> If foreign sovereigns could avoid the revenue rule by recharacterizing a foreign tax claim as a cause of action based on domestic law, such as common law fraud, or unjust enrichment, or breach of contract, or injury from a pattern of racketeering, the revenue rule would lose much of its force. Many, if not most, schemes to avoid the payment of taxes can be recharacterized in such terms.

Brief for the United States As Amicus Curiae at 13, *Canada*, 537 U.S. 1000 (No. 01-1317). Because the complaints here facially seek lost taxes and equitable relief aimed at enforcing foreign revenue laws, the Revenue Rule bars these claims.

2. The Revenue Rule Applies to Claims Seeking Injunctive Relief

Petitioners assert that the Second Circuit "applied an incorrect legal standard" because a "claim for injunctive relief under domestic law . . . falls well outside the traditional ambit of the revenue rule." Pet. 21.

Nothing in *Pasquantino* limits the reach of the Revenue Rule only to cases involving attempts to collect damages. On the contrary, this Court recognized the traditional definition of the Rule, which forbids "enforcing" foreign tax laws in the courts of another sovereign, not just suits to collect money. *Pasquantino*, 125 S. Ct. at 1770 ("At common law, the revenue rule generally barred courts from enforcing the tax laws of foreign sovereigns."); *accord id.* at 1779 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448 (1964) (White, J., dissenting) ("[C]ourts customarily refuse to enforce the revenue rule and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign.")).

That is consistent with the purposes of the Rule. Whether petitioners seek damages or equitable relief, the granting of any relief would be to permit exactly what the Revenue Rule was designed to prevent: allowing the judiciary to provide a foreign government greater enforcement assistance than that which the United States was willing to grant by treaty. As the United States stated in *Canada*, "claims for equitable relief seek to vindicate the same interest in avoiding tax loss and increased law enforcement costs as do petitioner's claims for damages." Brief for the United States As Amicus Curiae at 14 n.1, *Canada*, 537 U.S. 1000 (No. 01-1317). Indeed, the extensive equitable relief requested by petitioners would require the district court to become even more embroiled in foreign affairs, on a more

on-going basis, than would an award of monetary damages. Every court to address this issue agrees that the Revenue Rule applies to such equitable claims. *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1365 n.4 (S.D. Fla. 2002), *aff'd*, 341 F.3d 1253 (11th Cir. 2003), *cert. denied*, 540 U.S. 1109 (2004); *Canada*, 268 F.3d at 135 (dismissing all monetary and injunction claims).

3. *Pasquantino*'s Mention of Tax Treaties Provides No Basis For Reversal or Review

Although this Court stated in *Pasquantino* that it "expess[ed] no view" on the *Canada* case and whether a foreign government may bring a RICO action for a scheme to defraud it of taxes, *Pasquantino*, 125 S. Ct. at 1771 n.1, petitioners now claim that this Court in *Pasquantino* "considered, debated, and squarely declined to follow *Canada*'s . . . view of the revenue rule." Pet. 16.

Specifically, petitioners rely on the following single sentence in *Pasquantino* to argue that the holding below must be reversed (Pet. 12, 15-17): "Neither the antismuggling statute, 18 U.S.C. § 546, nor U.S. tax treaties, see [*Canada*], convince us that petitioners' scheme falls outside the terms of the wire fraud statute." *Pasquantino*, 125 S. Ct. at 1773.

The quoted sentence has nothing to do with the issue of whether the Revenue Rule applies in this case. As noted, in *Canada*, the Second Circuit discussed treaties to assess whether allowing civil cases to proceed would result in improper judicial interference in foreign tax matters. The Second Circuit found that the political branches negotiated tax treaties against the backdrop of the Revenue Rule and that allowing a foreign government to bring a civil cause of action to vindicate and enforce foreign tax laws would put the courts in the position of giving foreign governments

greater tax assistance than they have negotiated (or could negotiate) with the Executive Branch. *Canada*, 268 F.3d at 118-21. That analysis simply was not implicated in *Pasquantino*, where the Executive Branch decided to bring a criminal prosecution under U.S. law—an issue that would hardly be subject to treaty negotiations with another country.

Rather, in *Pasquantino*, this Court addressed treaties not in connection with its discussion of the Revenue Rule (in Part III of its opinion), but in connection with the *threshold question* of whether the smuggling scheme at issue fell within the "literal terms of the wire fraud statute" in Part II of the opinion. 125 S. Ct. at 1771. There, all this Court did was state that the existence of tax treaties did not limit the plain meaning of the wire fraud statute or limit the Executive Branch's ability to prosecute someone for violating the statute. The sentence in *Pasquantino*, therefore, did not address the Revenue Rule at all; rather, it addressed the extent to which the Court deemed "overlapping" laws, such as treaties or other statutes, to be significant in construing the scope of the wire fraud statute. *Compare id.* at 1773 & n.4 *with id.* at 1785-86 (Ginsburg, J., dissenting).

II. THE SECOND CIRCUIT NEVER HELD THAT THE REVENUE RULE IS "JURISDICTIONAL" AND NO CONFLICT EXISTS

Petitioners' only other basis for review asserts another straw man conflict, claiming that the Second Circuit erred on whether the Revenue Rule is a "jurisdictional" or discretionary doctrine. Pet. 25-28. Petitioners misstate the Second Circuit's ruling. The Second Circuit did not hold that the Revenue Rule "divests" the federal courts of their jurisdiction. Pet. 25. In fact, the court consistently has held the opposite, recognizing that the Rule is "not absolute." App. 29a; *accord* App. 9a. The court explained that "the

revenue rule will not be triggered where the sovereignty and extraterritoriality concerns that inform the rule's application are not present." App. 29a. But, "once the sovereignty and separation of powers concerns that inform the rule are implicated by the substance of a plaintiff's claims, the court may not hear those claims absent evidence that the rule has been abrogated." App. 43a. Thus, there is no conflict with the cases cited by petitioner stating that the Rule is not jurisdictional. Pet. 26.[8]

In any event, petitioners' alleged desire to grant courts discretion to permit "U.S. allies," Pet. 26, access to our courts to vindicate foreign revenue laws only underscores the need to leave such decisions to the political branches. To allow courts to decide which foreign government is an "ally" and which is not (or which foreign revenue laws deserve enforcement and which do not) would interject the judiciary into sensitive diplomatic issues better left to the political branches.

Finally, petitioners' suggestion that the Second Circuit erred in failing to remand the cases to the district court for a "claim-by-claim" review ignores the opinions below. Pet. 28-29. The Second Circuit twice engaged in its own *de novo* review of petitioners' complaints. App. 27a; *see also* App. 3a. Each time it found that the Revenue Rule applied to each claim.

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8. Petitioners also suggest that the Second Circuit's holding conflicts with the general rule that U.S. courts are "open to foreign governments." Pet. 27 & n.7. However, the Revenue Rule represents a well-established exception in both this country and abroad. *See generally* William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161 (2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RONALD S. ROLFE
GARY A. BORNSTEIN
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Counsel for Respondents British American Tobacco (Investments) Limited, and British AmericanTobacco (South America) Limited

MURRAY R. GARNICK
Counsel of Record
ANTHONY J. FRANZE
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Counsel for Respondents Altria Group, Inc. (f/k/a Philip Morris Companies Inc.), Philip Morris USA Inc. (f/k/a Philip Morris Incorporated), Philip Morris International Inc., Philip Morris Products Inc., Philip Morris Latin America Sales Corporation, and Philip Morris DutyFree Inc.

DAVID M. BERNICK
JONATHAN C. BUNGE
CHRISTOPHER TURNER
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
(312) 861-2000

Counsel for Respondents Brown & Williamson Tobacco Corporation and BATUS Tobacco Services, LLC.

MARY ELIZABETH MCGARRY
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

Counsel for Respondent B.A.T Industries p.l.c.

WILLIAM T. PLESEC
JONES DAY
901 Lakeside Avenue
North Point
Cleveland, OH 44114
(216) 586-3939

TIMOTHY J. FINN
LAURA TUELL PARCHER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondents R.J. Reynolds Tobacco Holdings, Inc., R.J. Reynolds Tobacco Company and RJR Acquisition Corp.

C. STEPHEN HEARD, JR.
EDMUND M. O'TOOLE
MATTHEW T. MCLAUGHLIN
VENABLE LLP
405 Lexington Avenue
62nd Floor
New York, NY 10174
(212) 307-5500

Counsel for Respondent R.J. Reynolds Tobacco International, Inc.

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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No. 05-549

IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

JOHN J. HALLORAN, JR.
Counsel of Record
JOHN F. SCHUTTY III
SPEISER, KRAUSE, NOLAN & GRANITO
Two Grand Central Tower
140 East 45th Street
New York, NY 10017
(212) 661-0011

Attorneys for Petitioners

Of Counsel:

KEVIN A. MALONE
CARLOS A. ACEVEDO
KRUPNICK CAMPBELL MALONE BUSER SLAMA HANCOCK LIBERMAN & MCKEE

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REPLY BRIEF

The Opposition Brief addresses issues that are not germane to the Petition, but does not, and cannot, dispute the main points on the Petition.

1. The Second Circuit's conclusions that Petitioners had claimed that "defendants violated tax laws" (App. 14a), and sought to compel Respondents to "obey [foreign] tax laws" (App. 14a n.10), are clearly erroneous. Petitioners made no such claims (Pet. 22-25), and even Respondents do not suggest otherwise. On the contrary, Respondents concede that Petitioners did not allege that Respondents were tax debtors. The court below thus misapprehended the equitable claims.

2. It is indisputable that the Second Circuit, on remand from this Court, applied its own, pre-*Pasquantino* version of the revenue rule to bar the equitable claims. App. 14a n.10. Accordingly, the Second Circuit applied an incorrect standard and reached an incorrect result in dismissing the equitable claims.

3. Respondents acknowledge, as they must, that the Second Circuit held that the federal courts "'may not'" hear Petitioners' equitable claims. Opp. 24 (citing App. 43a). The Fourth and Eleventh Circuits (and settled law), in contrast, have held that the revenue rule is a permissive abstention doctrine.

The Second Circuit's decision is unprecedented and warrants review by this Court.

I. THE SECOND CIRCUIT OVERLOOKED OR MISAPPREHENDED THE EQUITABLE CLAIMS AS PLED

This Case Does Not Assert a Claim Against a Tax Debtor

The Second Circuit made two pivotal errors (which are not addressed or disputed by Respondents): that Petitioners claimed that "defendants violated tax laws" (App. 14a), and that Petitioners' equitable claims sought to compel Respondents to "obey [foreign] tax laws." App. 14a n.10. Petitioners never made such claims; Petitioners repeatedly disavowed such claims; and, in any event, Petitioners *could not* have made such claims because Respondents are not alleged to be tax debtors. Pet. 22-25. Indeed, it is undisputed that there is no claim that Respondents are tax debtors. This critical fact was brought to the attention of the Second Circuit, but was overlooked. Pet. at 22-23. The Second Circuit's decision is thus clearly and demonstrably erroneous.

The equitable claims, as pled, do not implicate the revenue rule. These claims do not seek to "collect" taxes or "enforce" foreign tax laws, contrary to Respondents' suggestions. Opp. i, 1. On the contrary, the equitable claims seek to enjoin and deter *domestic* conduct, committed by *domestic* defendants, that contravenes *domestic* common law. If the equitable claims succeed, Respondents would be enjoined from selling cigarettes to and through organized criminal networks and terrorist groups — conduct that threatens security interests in the United States and elsewhere, and harms interests that are wholly independent of tax collection. This conduct, which the Second Circuit found to be irrelevant to its revenue rule analysis (App. 32a), should not be immunized by the revenue rule.[1]

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1. Respondents accuse the Petitioners of "recharacterizing their claims." Opp. 20. As Petitioners have made clear, "*the Defendants themselves are not alleged to owe taxes.*" Pet. 22 (citation omitted) (emphasis in original). There was no tax claim against Respondents that could have been "recharacterized."

Respondents would have this Court gloss over the dispositive fact that they are not alleged to be tax debtors. Respondents state: "Petitioners assert that the Second Circuit 'applied an incorrect legal standard' because a 'claim for injunctive relief under domestic law . . . falls well outside the traditional ambit of the revenue rule.'" Opp. 21 (quoting, in part, Pet. 21). In fact, the *full* quote from the Petition is: "A claim for injunctive relief under domestic law (*against domestic defendants which are not alleged to owe foreign taxes*) falls well outside the traditional ambit of the revenue rule." Pet. 21 (emphasis added).[2]

The Second Circuit Exceeded the Permissible Scope of Review

Respondents ignore the basic principles of civil practice. The case comes before this Court in the context of an appellate ruling affirming a judgment dismissing a complaint on a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Pet. 23-24. In reviewing a motion to dismiss, the court must assume that all well-pleaded factual allegations are true and draw all reasonable inferences in the plaintiff's favor. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

The Second Circuit did not follow this well-established standard. Rather, the Second Circuit recharacterized the pleadings, drew all inferences *against* Petitioners, and attributed equitable claims to Petitioners that were: (i) not pled in the

2. Respondents' discussion of tax treaties is irrelevant. *See* Opp. 2, 17-18. Respondents are not alleged to be tax debtors, and therefore, their obligations are not defined, covered, or addressed by tax treaties. As this Court recognized in *Pasquantino*, tax treaties do not limit otherwise applicable "*domestic*" law. *Pasquantino v. United States*, 125 S. Ct. 1766, 1773, 1776 (2005) (emphasis in original). Moreover, Respondents' suggestion that the revenue rule would bar the U.S. government from seeking *equitable* relief in *foreign* courts is incorrect. *See* Pet. 26-28 & n.7. Finally, the Republic of Colombia does not recognize the revenue rule (C.A. App. 3003-13) and, therefore, the revenue rule would not bar a U.S. claim in the Colombian courts as Respondents allege. Opp. 18.

Complaints; (ii) specifically disavowed by the Petitioners; and (iii) legally unavailable because Respondents are not alleged to be tax debtors. Pet. 22-25.

The Second Circuit Deprived Petitioners of a Hearing Upon Their Claims as Pled

Contrary to Respondents' assertion (Opp. 24), there has never been a claim-by-claim analysis of the claims *as pled*.

On remand, the Second Circuit did not consider each claim as pled. Rather, the Second Circuit recharacterized the Petitioners' equitable claims, aggregated the claims, and reached the incorrect and sweeping conclusion that the "present *suit*" was one to collect tax revenue and related costs. App. 13a (emphasis added); *see* Opp. at 16 n.6. This Court, in contrast, underscored the importance of conducting a claim-by-claim analysis in resolving a revenue rule defense. *Pasquantino*, 125 S. Ct. at 1777. The Second Circuit, through its misapprehension of the equitable claims as pled, and its failure to conduct a claim-by-claim analysis of those claims, failed to apply the applicable standard of review.

It cannot seriously be contended that the Second Circuit undertook a "thorough analysis" of Petitioners' claims. Opp. 11. While some claims for damages (previously asserted in the lower courts) might implicate the revenue rule as suggested by Respondents (Opp. 3), it is unimaginable that the revenue rule could reach the equitable claims as pled. This Court should therefore review and summarily reverse the judgment of the Second Circuit. *See Dye v. Hofbauer*, 126 S. Ct. 5 (*per curiam*) (2005) (judgment summarily reversed where the Court of Appeals simply overlooked properly presented claim); *Lincoln Property Co. v. Roche*, 126 S. Ct. 606 (2005) (judgment summarily reversed where the Court of Appeals, in disregard of the pleadings, purported to ascertain the real party in interest).

II. THE REVENUE RULE DOES NOT BAR THE EQUITABLE CLAIMS

The Second Circuit Applied an Incorrect Legal Standard to Dismiss the Equitable Claims

Respondents suggest that this Court's review is not warranted because the Second Circuit's decision applies a "long-settled" (Opp. 15) and "longstanding" (Opp. 19) rule. This argument is wholly misplaced.

The Second Circuit applied its own, overly broad "version" of the revenue rule to bar the equitable claims. Pet. 21 (citing App. 14a n.10). That "version" focused only upon the purported "effect" of the claims as recharacterized by the Second Circuit (App. 14a n.10); in contrast, this Court's revenue rule analysis focused upon the "domestic" conduct at issue (*Pasquantino*, 125 S. Ct. at 1777), the "*domestic*" legal basis of the claim (*id.* at 1776), and whether the "'whole object'" of the claim is to collect foreign taxes (*id.* at 1777) (citation omitted). There should be no question that, prior to *Pasquantino*, the revenue rule was "unclear" and "uncertain[ ]" in scope. *Id.* at 1778. The Second Circuit's overly broad, pre-*Pasquantino* "version" of the revenue rule is not well-established.[3]

Under the correct legal standard, the revenue rule does not bar Petitioners' common law equitable claims. In *Pasquantino*, this Court determined that the wire fraud case did not seek as its "'whole object'" to "'collect tax for a foreign revenue,'" and was, therefore, not barred by the revenue rule. *Pasquantino*, 125 S. Ct. at 1777 (citation omitted). Where the sole purpose of

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3. The Second Circuit's "version" of the revenue rule also conflicts with the *en banc* decision of the Fourth Circuit, holding that the revenue rule only "pertains to the nonenforcement of foreign tax judgments." *United States v. Pasquantino*, 336 F.3d 321, 329 & n.3 (4th Cir. 2003) (*en banc*), *aff'd*, 125 S.Ct. 1766 (2005). Respondents' effort to limit the Fourth Circuit's holding to "criminal prosecution[s]" (Opp. 15) is unavailing. There is one revenue rule, equally applicable in civil and criminal cases, as the Fourth Circuit confirmed.

the claim is *not* to collect taxes, the claim is not barred by the revenue rule. *See U.S. Securities and Exchange Commission v. Shull*, [1999] CarswellBC 1772, 1999 WL 33191253 (B.C.S.C. [In Chambers]) (Can.) (SEC may seek enforcement of U.S. judgment; "the disgorgement order is neither a penal sanction nor a taxation measure" even though a portion of the recovery would pay "some taxes"). It is undisputed that the equitable claims do not seek, in whole or part, to collect taxes owed by Respondents. Therefore, the revenue rule does not bar the common law equitable claims.[4]

Respondents assert in a footnote that the Second Circuit applied the "whole object" test as stated in *Pasquantino*. Opp. 16 n.6. This argument does not withstand scrutiny. The Second Circuit dismissed the equitable claims under its pre-*Pasquantino* version of the revenue rule (App. 14a n.10); only the dissent in *Pasquantino* embraced the Second Circuit's overly-broad version of the revenue rule. Moreover, the Second Circuit did not apply the "whole object" test to each claim; it applied the test to what it perceived to be the "suit" as a whole (App. 13a), in conflict with *Pasquantino*, which requires a claim-specific review. Most importantly, the Second Circuit did not apply the "whole object" test to the equitable claims *as pled*; the Second Circuit recharacterized and imputed claims to Petitioners that were not made and could not have been made.

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4. Respondents assert that the EC and Member States recognize the revenue rule. Opp. 18 n.7 (citing European Communities: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters art. 1, July 28, 1990, 29 I.L.M 1413, 1418). However, the said Convention addresses the reciprocal recognition of *judgments*, just as the revenue rule (as defined by the Fourth and Ninth Circuits and the Restatement (Third) on Foreign Relations Law) addresses claims to enforce *judgments* against tax debtors. In any event, because this is neither an action to enforce any sort of foreign judgment, nor an action against a tax debtor, the Convention is irrelevant.

Illustrating the sweeping nature of their view of the revenue rule, Respondents assert that the revenue rule covers all claims that might indirectly "enforce" or "vindicate" foreign law. Opp. i, 3, 17, 19-22. This Court, however, rejected this amorphous and subjective view of the revenue rule, holding that "the revenue rule never proscribed all enforcement of foreign revenue law." *Pasquantino*, 125 S. Ct. at 1778. The "indirect," "incidental" or "attenuated" enforcement of foreign tax law — such as may occur in cases under domestic law addressing domestic conduct — is permissible. *Pasquantino*, 125 S. Ct. at 1777-79. Thus, even if the equitable claims had an indirect effect of furthering foreign interests, the revenue rule would not bar that result.[5]

Pasquantino Is Not Limited to Criminal Cases

Respondents suggest that review is not warranted because *Pasquantino* is limited to criminal cases. Opp. i, 1, 9-10, 12-15. However, Respondents do not address the fact that, in *Pasquantino*, this Court confirmed that there is only *one* version of the revenue rule, equally applicable in civil and criminal cases. In *Pasquantino*, a *criminal* case, this Court recognized and applied a revenue rule definition that was developed in modern *civil* cases. In turn, this Court vacated and remanded in the present civil case for consideration of this Court's guidance in *Pasquantino*. This Court by its GVR Order obviously intended

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5. Respondents argue against injunctive relief, raising the specter of fifty States applying differing laws to address their conduct. Opp. 2, 20. The revenue rule is inapplicable to the equitable claims as pled, and there would be no occasion for *any* state to apply the revenue rule to such claims. In any event, it is well-established, across a spectrum of jurisdictions, that an equitable remedy is available to a governmental plaintiff to enjoin the sort of cross-border tortious activity at issue here. *See, e.g., Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 564 (1851) (government may seek injunction to enjoin cross-border public nuisance); *see also* Restatement (Second) of Torts § 821C cmt. j (1979).

its guidance to be followed on remand in the present *civil* case *European Community v. RJR Nabisco, Inc.*, 125 S. Ct. 2611 (2005).[6]

The Second Circuit's Decision Is Unprecedented

Before this case, the revenue rule had never been applied to bar equitable claims, under State common law, addressing domestic conduct by domestic companies.

Respondents point to two decisions to support their view that the revenue rule bars equitable claims for injunctive relief under State law. Opp. 22 (citing *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1365 n.4 (S.D. Fla. 2002), *aff'd*, 341 F.3d 1253 (11th Cir. 2003), *cert. denied*, 540 U.S. 1109 (2004), and *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings*, 268 F.3d 103, 135 (2d Cir. 2001)). In *Ecuador*, the court did not decide State law issues. *Ecuador*, 188 F. Supp. 2d at 1367 n.6 ("the Court only decides the applicability of the revenue rule in the civil RICO context"). Similarly, *Canada* decided only civil RICO claims and, upon the dismissal of the federal claims, the court had no occasion to address the State law claims. *Canada*, 103 F. Supp. 2d at 155 ("the court declines to exercise supplemental jurisdiction over the common law fraud action"). Both cases were ultimately the subject of a petition to this Court; however, the questions

6. Respondents embrace a "civil-criminal distinction," arguing that the revenue rule is defined and applied differently in civil and criminal cases. Opp. 9-10, 12-15. There is *one* revenue rule, and if the particular claim does not seek to collect foreign taxes from a tax debtor (as here), the claim does not trigger the revenue rule, regardless of the identity of the plaintiff. The factual predicate for invocation of the revenue rule – a tax claim against a tax debtor – is not present in the instant case, and the "civil-criminal" distinction is not remotely implicated by the equitable claims before this Court. Because the claims before this Court are not tax claims, none of the policies said to underlie the revenue rule is implicated, there is no risk of embroiling the courts in the conduct of foreign relations, and no special safeguards are necessary to allow the cases to be heard.